IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

VICKI COLLINSWORTH

Plaintiff,

CIVIL ACTION
No. 03-2299-GTV

vs.

EARTHLINK/ONEMAIN, INC.,

Defendant.

MEMORANDUM AND ORDER

Plaintiff Vicki Collinsworth brings this action alleging that her employment at Defendant Earthlink/Onemain, Inc. ("Earthlink") was terminated in violation of the Family and Medical Leave Act of 1993 ("FMLA"), 29 U.S.C. §§ 2601 et. seq., and that Defendant wrongfully discharged Plaintiff under state law in anticipation of her filing a workers compensation claim. This action is before the court on Defendant's motion to dismiss count one of Plaintiff's first amended complaint (Doc. 5). Defendant argues that Plaintiff's FMLA claim should be dismissed for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) because Plaintiff is not an eligible employee under the FMLA. In a previous order, this court ruled that Defendant's motion should be converted to a motion for summary judgment under Fed. R. Civ. P. 56 and granted the parties time to present any additional materials the parties felt necessary for the court to rule on such a

motion (Doc. 14).[1] Defendant's motion is now ripe because the parties have declined to submit any additional materials. For the following reasons, Defendant's motion is denied.

I. FACTUAL BACKGROUND

The following facts are either uncontroverted or viewed in a light most favorable to Plaintiff.

Defendant hired Plaintiff as an account executive on June 12, 1999 at its Overland Park, Kansas location. In the spring of 2001, doctors diagnosed Plaintiff with breast cancer. Between May and September of 2001, Plaintiff underwent surgery and received several treatments arising from her cancer diagnosis. During this period, Plaintiff states that she used her FMLA leave to recover from the surgery and medical treatments. Plaintiff also states that she continued to work from her home despite being on FMLA leave. In January 2002, Plaintiff informed her direct supervisors, Jill Compton and Leland Thoburn, that she had developed carpal tunnel syndrome ("CTS") as a result of her work. By March 2002, Plaintiff informed Jill Compton that she needed surgery on her hands to correct the CTS.

Plaintiff alleges that on May 13, 2002, Leland Thoburn informed her that her position was

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[1] In that order, this court concluded that eligible employee status under the FMLA implicated both subject matter jurisdiction and the underlying merits of Plaintiff's prima facie case. Morrison v. Amway Corp., 323 F.3d 920, 927-28 (11th Cir. 2003); see also Trainor v. Apollo Metal Specialities, Inc., 318 F.3d 976, 978 (10th Cir. 2002) ("[W]hen subject matter jurisdiction is dependent upon the same statute which provides the substantive claim in the case, the jurisdictional claim and the merits are considered to be intertwined."). Following Morrison, this court ruled that Defendant's 12(b)(1) motion should have been brought under either Rule 12(b)(6) or Rule 56. See Morrison, 323 F.3d at 930. Because both parties submitted affidavits with their briefs, this court determined that Defendant's motion should be treated as a summary judgment motion under Rule 56 and granted the parties time to submit additional materials.

being moved to Pasadena, California; Plaintiff either had to move to California or leave Defendant's employment. Plaintiff further alleges that Jill Compton told her this proposition was due to her health problems. On May 15, 2002, Plaintiff informed Defendant's Human Resource Department of her need for hand surgery.

On June 7, 2002, Plaintiff received a job performance reprimand from Leland Thoburn. The reprimand again stated Plaintiff was to move to Pasadena, California or she would have to leave Defendant's employment. Due to the job performance reprimand, Defendant placed Plaintiff on formal corrective action on July 29, 2002. Defendant terminated Plaintiff's employment on August 15, 2002.

Plaintiff claims Defendant's actions were in retaliation for utilizing her FMLA leave and for her future claims under Kansas workers compensation law.

II. STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Lack of a genuine issue of material fact means that the evidence is such that no reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Essentially, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 251-52.

The moving party bears the initial burden of demonstrating the absence of a genuine issue

of material fact. This burden may be met by showing that there is a lack of evidence to support the nonmoving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). Once the moving party has properly supported its motion for summary judgment, the burden shifts to the nonmoving party to show that there is a genuine issue of material fact left for trial. Anderson, 477 U.S. at 256. "[A] party opposing a properly supported motion for summary judgment may not rest on mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." Id. Therefore, the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. Id. The court must consider the record in the light most favorable to the nonmoving party. Bee v. Greaves, 744 F.2d 1387, 1396 (10th Cir. 1984).

III. DISCUSSION

"In order to state a claim under the FMLA, a complaint must at least contain allegations which establish that, within the meaning of the FMLA, the defendant employer is an 'employer' and the plaintiff employee is an 'eligible employee.'" Schmitt v. Beverly Health & Rehab. Servs., 962 F. Supp. 1379, 1383-84 (D. Kan. 1997) (citation omitted). Defendant's motion argues that Earthlink is not a covered "employer" under the FMLA "because Earthlink has never employed more than fifty (50) employees at or within seventy-five (75) miles of its Overland Park location." Plaintiff maintains that Defendant's motion actually disputes whether Plaintiff is an "eligible employee" under the FMLA. The court agrees with Plaintiff that Defendant's motion raises the question whether Plaintiff is an "eligible employee" under the FMLA.

The FMLA defines "employer," in part, as "any person engaged in commerce or in any

industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year." 29 U.S.C. § 2611(4)(A)(i). Defendant's brief admits that Earthlink employs more than fifty employees nationwide, and thus, Defendant is a covered "employer" under the FMLA.

The FMLA defines "eligible employee," in part, as "an employee who has been employed for at least 12 months by the employer" and "for at least 1,250 hours of service with such employer during the previous 12-month period." 29 U.S.C. § 2611(2)(A). The FMLA, however, further restricts the definition of "eligible employee" by excluding "any employee of an employer who is employed at a worksite at which such employer employs less than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is less than 50." 29 U.S.C. § 2611(2)(B)(ii). Defendant's argument that Earthlink employs less than fifty employees within seventy-five miles its Overland Park, Kansas location therefore disputes Plaintiff's status as an "eligible employee" under the FMLA.

Defendant maintains that Earthlink employed Plaintiff at its Overland Park, Kansas office at the time of the events giving rise to the litigation. In support of its argument that Earthlink employs less than fifty employees within seventy-five miles of its Overland Park, Kansas location, Defendant attached the affidavit of Lynn Felgenhauer, Senior Human Resource Manager at Earthlink. Ms. Felgenhauer's affidavit states that Earthlink's Overland Park, Kansas location employed seven employees in 2001, eight employees in 2002, and nine employees in 2003. Ms. Felgenhauer also states that Earthlink does not have any other employees at any other location within seventy-five miles of its Overland Park, Kansas office.

In response, Plaintiff argues that she is an eligible employee under the FMLA because her "worksite" under 29 U.S.C. § 2611 (2)(B)(ii) is located at Earthlink's Pasadena, California office, not Earthlink's Overland Park, Kansas office. Plaintiff further states that Earthlink's Pasadena, California office employs fifty or more employees within a seventy-five mile radius of that location. In support of her position, Plaintiff cites 29 C.F.R. § 825.111, a Department of Labor regulation interpreting "eligible employee" status under the FMLA. That regulation states, in part:

> In determining if an employee is "eligible" under FMLA, how is the determination made whether the employer employs 50 employees within 75 miles of the worksite where employee needing leave is employed?
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> (a) Generally, a worksite can refer to either a single location or a group of contiguous locations. . . . An employee's worksite under FMLA will ordinarily be the site the employee reports to or, if none, from which the employee's work is assigned.

29 C.F.R. § 825.111 (2003). In her affidavit, Plaintiff states that she worked for various supervisors during her employment at Earthlink, including Leland Thoburn, Vice President of Strategic Relations, Jill Compton, Director of Sprint Strategic Alliance, and Stephen Salinger, Director of Strategic Relations who replaced Jill Compton on or about July 19, 2002. Plaintiff maintains that Leland Thoburn and Stephen Salinger were both located at Earthlink's Pasadena, California office, and that Jill Compton was located at Earthlink's Overland Park, Kansas office.

Plaintiff alleges that she performed her work duties out of her own home, as well as Earthlink's Overland Park, Kansas office. She maintains that all of her work assignments were sent to her by electronic mail, telephone conferences, and facsimiles from Earthlink's Pasadena, California office and that she sent her work product to her supervisors at Earthlink's Pasadena,

California office (although the court notes that Plaintiff qualified this allegation by stating that at first her "work assignments came to some extent from Jill Compton at the Overland Park office," but that over time her work was performed exclusively with her supervisors at the Pasadena office). Finally, Plaintiff claims that she made several trips to Pasadena, California because part of her job required her to meet with her supervisors at Earthlink's Pasadena office. The court concludes that genuine issues remain for the trier of fact concerning Plaintiff's status as an eligible employee under the FMLA. See Morrison, 323 F.3d at 928 (holding that "the question of 'eligible employee' status implicates both jurisdiction and the merits, and is properly reserved for the finder of fact"). The court notes that the allegations contained in Plaintiff's affidavit are uncontroverted because Defendant failed to file a reply to Plaintiff's response brief disputing the location of Plaintiff's worksite. Plaintiff's affidavit provides uncontroverted evidence that: (1) she reported to supervisors located at Earthlink's Pasadena, California office; and (2) she received her work assignments and sent her final work product to Earthlink's Pasadena, California office. At this early stage in the litigation, Plaintiff's affidavit creates a genuine issue as to the location of Plaintiff's worksite under 29 C.F.R. § 825.111, and thus, whether Plaintiff is an eligible employee under the FMLA.

IT IS, THEREFORE, BY THE COURT ORDERED that Defendant's motion for summary judgment (Doc. 5) is denied.

Copies of this order shall be transmitted to counsel of record.

IT IS SO ORDERED.

Dated at Kansas City, Kansas, this 4th day of December 2003.

/s/ G.T. VanBebber
G. Thomas VanBebber
United States Senior District Judge